

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CANNISTRA REALTY, LLC,

Plaintiff,

DECLARATION OF
DANIEL J. GAUGHAN

-against-

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ANDREW WHEELER, in his official capacity
as Administrator of the United States Environmental
Protection Agency, and ANGELA CARPENTER, in her
official capacity as Acting Director of the Emergency
and Remedial Response Division of the United States
Environmental Protection Agency, Region 2,

Defendants.

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Daniel J. Gaughan, Life Scientist, Superfund and Emergency Management Division,
United States Environmental Protection Agency ("EPA"), Region II, Edison, New Jersey,
pursuant to 28 U.S.C. § 1746, hereby declares and states as follows:

1. I am an on-scene coordinator ("OSC") and the Acting Removal Assessment and Enforcement Section Chief in the Superfund and Emergency Management Division ("SEMD") of EPA, Region II, in Edison, New Jersey. I am making this Declaration in support of Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction.
2. As an OSC, I am responsible for, among other things, planning the appropriate assessment and sampling protocol for all assigned sites, contacting property owners and representatives to gain access to properties, implementing sampling plans, reviewing and interpreting analytical data, and if necessary developing and conducting removal actions based on interpretation of the sampling data. As Acting Removal Assessment and Enforcement Section Chief, I am responsible for overseeing a group of six OSCs and assisting them with the above-stated obligations at each of their respective sites.
3. Unless otherwise indicated, the facts set forth herein are based on my technical knowledge derived from my years of experience and training as a life scientist and my knowledge of Cannistra Realty, LLC ("Cannistra Realty") and the Canadian Radium and Uranium Site ("Canadian Radium Site" or "Site"). This knowledge is based on my personal involvement with the Site, my review of EPA's regional files, conversations I have had with EPA employees and contractors, and on knowledge and belief.

4. EPA Region II seeks access to property owned by Cannistra Realty, located at 115 and 125 Kisco Avenue in Mount Kisco, Westchester County, New York ("the Property"). The Property is currently leased to Tesla, Inc., for use as a showroom and service center. Access is requested for approximately 4 to 6 days. This reflects a conservative estimate of the duration of the work, accounting for potential weather delays and/or other unforeseen circumstances. Completion of the response activities will likely require less time.

5. The Property is immediately adjacent to the former Canadian Radium and Uranium Corporation ("CanRad") facility, which makes up a portion of the Canadian Radium Site. From approximately 1943 until 1966, CanRad operated a facility at the Site where uranium and other radioactive elements were recovered from uranium-bearing sludge, old instrumentation, and watch dials. From 1943 to the 1950s, the primary product that was recovered at the CanRad facility was uranium; subsequently, radium became the principal product until the facility's closure in 1966.

6. In November and December 1966, the CanRad facility buildings (a two-story concrete block building and two smaller one-story concrete block buildings) were demolished as part of a Mount Kisco urban renewal project. Demolition was performed by crane, and demolition material was piled at the facility for off-site disposal. The facility and surrounding areas were scraped to required depths. The exact location of the former CanRad buildings has not been determined as the area was redeveloped and roadways were changed. The current building at the former facility was built before 1971.

7. Investigations at the Canadian Radium Site were performed in the 1970s, 1980s, and 1990s by various local and state agencies. Each investigation indicated elevated levels of radiation remained in soils at the former facility. In 1993 and 1994, and again in 2013, EPA investigated the contamination at the Site to determine whether the Site qualified for the National Priorities List, a list of releases eligible for long-term remedial action. Gamma screening and sampling results indicated that measurable residual radiological contamination remains at the Site, including radium-226 and thorium-230.

8. The EPA Removal Program conducted three sampling events at the former facility portion of the Canadian Radium Site in August to October 2015, in April 2016, and in December 2016. During those events, EPA identified radon gas at levels as high as 19.5 pico curies per liter (pCi/L), which is above the EPA Removal Management Level of 4 pCi/L, within the main building located at the former CanRad facility. The current owner installed a radon mitigation system to mitigate the radon gas.

9. Soil samples were obtained through the process of taking a total of 34 soil borings during the three sampling events. Soil samples collected from the borings were analyzed for radiological contaminants. Analytical results for the soil samples indicated significantly elevated levels of radium-226. Samples collected close to the boundary with the Cannistra Property indicated concentrations of radium-226 at 29.96 pico Curies per gram (pCi/g) and 11.3 pCi/G. EPA has determined that a site-specific action level for radium-226 is 2.52 pCi/g. EPA also

performed radiological surveying and observed an area of elevated gamma readings in the northeast portion of the Former CanRad Facility at the border with the Property.

10. The assessment work at the Canadian Radium Site, along with historical information regarding the former CanRad facility, indicate that radium-226 and thorium-230 may be located on the Property.

11. EPA plans to perform routine investigatory activities at the Property to determine whether there is a release or threatened release of hazardous substances there and, if so, the extent, and whether there are risks to human health and the environment that would require EPA response activities. First, EPA plans to collect radon samples using what are called "passive diffusers." As part of this process, hockey puck-sized, radon canisters will be placed indoors in the building at the Property and left there, undisturbed, for 72 hours. The canisters will then be collected and sent to a laboratory for analysis.

12. EPA also plans to perform a radiological screening of the Property utilizing a gamma probe attached to a computer and a geographical positioning system device to create a figure that identifies the location and levels of potential radiological concern. Prior to beginning the screening, EPA will need to calibrate the instruments and ensure they are functioning properly. The instruments will then be placed in and on top of a baby-jogging stroller and pushed by hand in open areas of the property. Results of the radiological screening will be generated almost instantaneously, and EPA will analyze the results to determine whether previously selected soil sampling locations need to be adjusted or supplemented in order to comprehensively assess the Property. The entire screening process is expected to take two to four hours.

13. EPA will utilize ground penetrating radar and other instrumentation to screen each proposed soil boring location for underground utilities. This step can take up to 30 minutes per location depending upon what is observed. If utilities or other unknown underground issues are detected, the proposed boring location will need to be moved.

14. EPA will utilize a direct-push "Geoprobe" soil sampling device to collect soil samples down to eight feet in depth. EPA anticipates utilizing a Geoprobe about the size of a large lawn tractor, which will minimize the obtrusiveness of the work. EPA has proposed ten locations throughout the Property for soil sampling. EPA intends to take soil samples in four areas: along the southern side of the building; along the railroad track side of the building, along the Kisco Avenue side of the building, and in the parking lot. However, the ultimate locations may change dependent upon the results of the radiological survey of the property.

15. The Geoprobe is a minimally invasive sampling device. The diameter of the rods are approximately 2-3 inches and the resulting hole will be almost imperceptible. Each currently proposed sampling location is situated in a grassy/mulch area, including the median in the parking lot, and would be difficult to observe once properly filled in.

16. For each soil sample, EPA will move the Geoprobe to the designated sampling location, decontaminate the cutting shoe and rods of the Geoprobe, collect the soil boring, record

the soil composition in a log book, screen the sample with a gamma detector, collect the soil samples into glass jars, record other observations in the log book, return unused soil to the borehole, and then place separate soil/asphalt in the borehole up to grade. Each boring can take up to 2 hours to complete.

17. Soil samples that are collected from the Property will be analyzed for radiological parameters. All gamma screening and sample results will be included in a final sampling trip report, and a copy will be provided to Cannistra Realty, if requested.

18. For all response activities under CERCLA, it is standard practice to first seek to obtain access on consent. The OSC contacts a property owner directly and explains the rationale for the need for EPA's access. The OSC generally provides a standard Consent for Access to Property form, which may be modified to include certain site-specific information and/or circumstances (e.g., the property owner's name, the property address, tax map identification, and a description of the activities that EPA seeks to conduct). The OSC makes him or herself available to address any comments, questions, or concerns.

19. I contacted Victor Cannistra on May 10, 2018, via telephone to discuss EPA's desire to expand its investigation of the Canadian Radium Site onto the Property. I followed the phone call with an email containing copies of Removal Assessment Trip Reports for the former CanRad facility from November 2016 and May 2017, which provide Site history, sampling data, and Site figures. I was contacted on May 18, 2018 by Mr. Cannistra's attorney, Joel Sachs. At that time, as is standard practice when attorneys become involved in access discussions, I contacted the EPA Site staff attorney, Margo Ludmer. Ms. Ludmer and I spoke with Mr. Sachs by phone that day, providing the same information that was conveyed to Mr. Cannistra.

20. Cannistra Realty's response to EPA's request for access consisted of very specific items including the following: limitation of the work to agreed-upon days and times when Tesla is not open for business (it is open seven days a week); a request for phased work so that Cannistra Realty could review the gamma screening data and determine if soil sampling was necessary; specific insurance coverage for Cannistra Realty and Tesla by EPA's contractor; indemnification of Cannistra and Tesla for any loss of income or termination of the leasehold; advanced written notice for access; no storing of equipment on the Property overnight; and the restoration of the Property to Cannistra Realty's reasonable satisfaction.

21. There are no unique circumstances at this Property that would warrant modification of EPA's normal work schedule (i.e., approximately 8:00 AM to 5:00 PM, Monday through Friday, on consecutive days). The fact that the Property has a business that operates during normal business hours is not unusual. EPA and its contractors and sub-contractors perform work in congested areas on a regular basis. EPA has rigorous health and safety standards for its personnel and contractors, and all appropriate safety concerns are addressed in site-specific health and safety plans that take into account the use of a particular site in determining potential hazards.

22. In eight years of working at EPA, I have never performed assessment work at night because a property was the site of a business that operates during normal business hours. I

have conferred with other OSCs in Region II with decades of experience, cumulatively, and they also have not performed nighttime sampling work to accommodate a property that is commercially active during the day. I have worked at night on an extremely limited basis and only under time-critical circumstances. There are no conditions at the Property requiring such a response, and night work is neither necessary or appropriate.

23. There are health and safety concerns associated with the performance of the work during nighttime hours. EPA employees, as well as EPA contractor and sub-contractor employees, are not accustomed to working at night. Because of this, the use of drilling equipment at night could lead to an accident, even if outdoor lighting is provided. Because of the potential dangers of operating the Geoprobe, it is essential that employees are not fatigued when performing the work. All personnel would need to adjust their wake/sleep schedules. Also, a work schedule from 6:00 AM to 9:00 PM (an exceedingly long work day) in order to allow certain work to be performed outside of Tesla's business hours, as proposed by Cannistra Realty, would not be acceptable.

24. If EPA limited all of its work to the early morning and late evening (i.e., a couple hours before 8:00 a.m. and after 7:00 p.m.), that would require EPA employees, contractors, and subcontractors to discontinue work for 11 hours each day and would drastically extend the duration of the mobilization. Even if only a portion of the work—for example, soil sampling in the parking lot—had to be performed when Tesla is closed, the schedule would still contain significant inefficiencies. For example, EPA may begin soil sampling in the parking lot before 8:00 AM, but if it was mid-sample at 8:00 AM, it would be forced to stop work at that particular sampling location and resume again at 7:00 PM. Further, by the second day of the sampling event, EPA would likely be finished with all non-parking lot soil samples and would be required to wait idly at the Site until 7:00 PM or 6:00 AM the following morning in order to resume work. Performing work during normal business hours allows EPA to maximize its time at the Property and minimize the number of overall days for the sampling event. It also allows EPA to quickly purchase any necessary items from local hardware stores should a piece of equipment break, whereas after business hours that option would not be available. Further, it allows EPA flexibility in case EPA needs to take additional samples, weather prevents EPA from performing certain aspects of its work, or there are unexpected other delays or issues that arise causing EPA to have to adjust its schedule.

25. The Property is mostly located in a commercial area, but there is a residential neighborhood on the eastern side of the railroad tracks and a seven-story apartment building located approximately 250 feet east of the Property. The noise of the Geoprobe during the early morning and nighttime hours would create a disturbance for nearby residents.

26. EPA Region II's removal action response personnel are currently working on approximately 70 active assessments and projects. Some of those sites impact multiple properties, so that the actual number of properties requiring EPA access at those sites is approximately 300. Other EPA program personnel also regularly require access to properties to perform response work under other phases of EPA's CERCLA program. If property owners at even a small portion of these properties to which access is needed were to routinely request extraordinary conditions to access, such as that EPA only work at night, the impact on the

Agency and its contractors and sub-contractors would be extreme. EPA's ability to efficiently and effectively respond to potential human health and environmental concerns would be adversely impacted. Sub-contractors that are needed to perform specialized work may be reluctant to bid on jobs with nighttime hour restrictions and/or could raise their rates considerably.

27. Cannistra Realty has proposed that EPA perform the work in multiple mobilizations. Doing so would be highly inefficient and would nevertheless require that work be performed during Tesla's business hours. Non-consecutive days is less efficient from a time management and cost perspective. EPA typically mobilizes to a site once to conduct all relevant work and prefers to work consecutive hours and consecutive days. This saves costs and allows for the timely completion of response activities.

28. EPA has no intention of entering the Property to perform the investigatory work during the pendency of this litigation, which is in accordance with EPA policy. Even if a court order is issued to the United States directing Plaintiff to provide access, EPA would need approximately three weeks to prepare and mobilize to conduct the contemplated sampling activities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: Edison, New Jersey
May 28, 2019

A handwritten signature in black ink, appearing to read 'Daniel J. Gaughan', with a long horizontal line extending to the right.

DANIEL J. GAUGHAN
Acting Removal Assessment and Enforcement
Section Chief
Superfund and Emergency Management Division
United States EPA, Region II